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13 Cross-Defendant CHURCH OF
14 SCIENTOLOGY INTERNATIONAL

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF MARIN

17 CHURCH OF SCIENTOLOGY)
18 INTERNATIONAL, a California not-)
19 for-profit religious corporation;)

20 Plaintiffs,)

21 vs.)

22 GERALD ARMSTRONG; MICHAEL WALTON;)
23 et al.,)

24 Defendants.)

25 _____)
26 GERALD ARMSTRONG,)

27 Cross-Complainant,)

28 vs.)

29 CHURCH OF SCIENTOLOGY)
30 INTERNATIONAL, a California)
31 Corporation; DAVID MISCAVIGE;)
32 DOES 1 to 100;)

33 Cross-Defendants.)

CASE NO. 157 680

CHURCH OF SCIENTOLOGY
INTERNATIONAL'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION, AS TO GERALD
ARMSTRONG'S SECOND AMENDED
CROSS-COMPLAINT

[C.C.P. 437c]

DATE: September 9, 1994
TIME: 9:00 a.m.
DEPT: 1

DISCOVERY CUT-OFF: Aug. 30,
1994
MOTION CUT-OFF: Sept. 13,
1994
TRIAL DATE: Sept. 29, 1994

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I. INTRODUCTION

On June 17, 1994, this Court struck the Second Amended Cross-complaint filed by defendant Gerald Armstrong against plaintiff and cross-defendant Church of Scientology International ("the Church") except for two finite allegations of abuse of process.

He first accuses the Church of filing a declaration which purportedly makes false statements about Armstrong in a federal case in which Armstrong is not a party. Armstrong, however, was identified as an expert witness in that case by the Church's adversary, his history of litigation with the Church was the subject of a declaration filed by the Church's opponent in that case, and the declaration in question addressed Armstrong's bias, lack of expert credentials, and history of unreliable testimony regarding the Church. Accordingly, the filing of that declaration is absolutely privileged under C.C.P. § 47(b), and Armstrong's claim is fatally deficient.

Armstrong's second claim is equally barred. There, he claims that the Church's discovery of his financial records in this action abused process. Such an assertion is tenuous enough in an action such as this for fraudulent conveyance, but Armstrong's claim is rendered moribund by the fact that this Court already rejected Armstrong's objections to that discovery and because the evidence is conclusive and undisputed that the discovery has been used for no purpose other than for preparation of this case.

Thus the Church seeks, and is entitled to, summary judgment on these final vestiges of Armstrong's countersuit. The

1 pertinent facts are presented, and they unequivocally dispel the
2 possibility of a remaining factual issue and establish the
3 Church's entitlement to judgment in its favor as a matter of law.

4 **II. PROCEDURAL HISTORY**

5 Armstrong's efforts to plead a viable cross-complaint have
6 been marked by failure. His initial attempt died when he failed
7 to contest the Church's general demurrer. His First Amended
8 Cross-Complaint was eviscerated when this Court sustained the
9 Church's demurrer with prejudice as to part of it and with leave
10 to amend as to the remainder.¹

11 Armstrong then filed a second amended cross-complaint
12 purporting to assert a 76-paragraph claim for abuse of process.
13 On June 17, 1994, this Court issued an Order which struck most of
14 the second amended cross-complaint, except for two limited claims
15 for abuse of process: the first, a claim that the Church had
16 "file[d] a false declaration in a federal district court action,"
17 and the second, a claim that the Church had "use[d] the discovery
18 process [in this action] to obtain information for improper
19 purposes." [Sep.St.No. 1, 2.]² As demonstrated herein, each of
20 these limited claims is also barred: the first, because the
21 conduct alleged is absolutely privileged, and the second, because
22 cross-defendant's discovery in this action (1) was completely

23
24 ¹ References to the supporting evidence herein are made to
25 the accompanying Separate Statement of Undisputed Facts, which
states each fact and the evidentiary matter which supports it.
References are to "Sep.St.No. ___" for "Separate Statement No. ___."

26 ² This Court also granted Armstrong leave to file a Third
27 Amended Complaint, removing all of the stricken matter, which
28 Armstrong has failed to do. Hence, CSI moves for summary judgment
on the Second Amended Cross-Complaint as amended by the Court's
Order.

1 proper; (2) was judicially approved and (3) has not been used for
2 any purpose other than to enable cross-defendant to prepare this
3 action for trial.

4 III. ARGUMENT

5 A. **Applicable Standard**

6 Summary judgment is properly granted when the evidence
7 furnished by the moving party establishes that there is no issue
8 of material fact to be tried and that the movant is entitled to
9 judgment as a matter of law. Code of Civil Procedure Section
10 437c. Summary adjudication is the proper procedure for
11 determining an issue of law. See, Zahn v. Canadian Indem. Co.
12 (1976) 57 Cal.App.3d 509, 512, 126 Cal.Rptr. 286. The trial
13 court is called upon to decide if a triable issue of fact exists.
14 Pittelman v. Pearce (1992) 6 Cal.App.4th 1436, 8 Cal.Rptr.2d 359.
15 If none does, and the sole remaining issue is one of law, it is
16 the duty of the trial court to determine it. Id.

17 B. **The Church Is Entitled To Judgment On Armstrong's First 18 Claim For Abuse of Process Because The Claim Is Based On 19 Communications Which Are Absolutely Privileged As A Matter 20 Of Law**

21 In his first surviving claim, Armstrong alleges that the
22 Church filed a declaration of David Miscavige in Church of
23 Scientology Int'l. v. Fishman, et al., No. CV 91-6426 HLH(Tx)
24 (C.D. Cal.) ("the Fishman case") which "falsely accuses Armstrong
25 of various acts relating to his experiences with Scientology
26 prior to the 1986 settlement." [Sep.St.No. 3.]

27 However, as demonstrated below, when the full record of the
28 relevant proceedings in the Fishman case is placed before the
Court, it is apparent that the filing of the declaration, with

1 its one-paragraph reference to Armstrong, is an absolutely
2 privileged communication pursuant to Civil Code Section 47(b),
3 and may not form the basis for an abuse of process claim as a
4 matter of law.

5 Civil Code Section 47 provides in relevant part that "A
6 privileged publication or broadcast is one made: (b) In
7 any judicial proceeding. . . ." As the California Supreme Court
8 recently re-emphasized,

9 For well over a century, communications with "some
10 relation" to judicial proceedings have been absolutely
11 immune from tort liability by the privilege codified as
12 section 47(b). At least since then-Justice Traynor's
13 opinion in Albertson v. Raboff (1956) 46 Cal.2d 375,
14 295 P.2d 405, California courts have given the
15 privilege an expansive reach. Indeed, as we recently
16 noted, "the only exception to [the] application of
17 section 47(2) [now § 47(b)] to tort suits has been for
18 malicious prosecution actions. [Citations]."

19 Rubin v. Green (1993) 4 Cal.4 1187, 1194, 17 Cal.Rptr.2d 828,
20 831, quoting Silberg v. Anderson (1990) 50 Cal.3d 205, 216, 266.

21 Indeed, the privilege for publications in a lawsuit applies
22 to all publications in judicial proceeding, so long as the
23 publication "(1) . . . was made in a judicial proceeding; (2) had
24 some connection or logical relation to the action; (3) was made
25 to achieve the objects of the litigation; and (4) involved
26 litigants or other participants authorized by law." Umansky v.
27 Urquhart (1978) 84 Cal.App.3d 368, 371, 148 Cal.Rptr. 547. As
28 demonstrated by the portions of the Fishman record attached to
the accompanying Request for Judicial Notice, the Miscavige
declaration was a communication bearing "some relation" to the
Fishman action which meets all four of these criteria.

The following relevant facts concerning the Fishman

1 declaration are undisputed:

2 1. Gerald Armstrong was identified in the Fishman case by
3 defendants Steven Fishman and Uwe Geertz as a witness and,
4 indeed, an expert witness, at least six times, five of which
5 occurred prior to the filing of the declaration of which
6 Armstrong complains. [Sep. St.No. 4.] The first time Armstrong
7 was named as a witness was August 26, 1992. [Id.] On December 1
8 and December 22, 1993, he was listed as one of Geertz's
9 purportedly expert witnesses, and his listed address was in care
10 of his attorney herein, Ford Greene. [Id.];

11 2. On December 7, 1993, counsel for Geertz filed and
12 served narrative statements regarding the expected testimony of
13 expert witnesses. The first witness so listed is Gerald
14 Armstrong. The narrative stated, inter alia, that Armstrong had
15 agreed to testify about a great variety of aspects regarding the
16 Church and the Founder of the Scientology religion, L. Ron
17 Hubbard. [Sep.St.No. 5];

18 3. In a declaration dated October 26, 1993, another of
19 Geertz's "expert" witnesses, Vaughn Young, asserted that Mr.
20 Miscavige had, in 1981, ordered him to "get Armstrong" by
21 preparing a "reward" poster characterizing Armstrong as a
22 criminal. In support of his declaration, Young attached a copy
23 of the decision of the trial court in the case of Church of
24 Scientology of California v. Armstrong, the case which ultimately
25 resulted in the settlement agreement that forms the basis for the
26 current action. [Sep.St.No. 6];

27 4. Non-party David Miscavige was also listed by defendant
28 Geertz as an expected trial witness at least six times.

1 [Sep.St.No. 7];

2 5. On February 8, 1994, Mr. Miscavige filed a declaration
3 which was, in part, a response to the accusations made by
4 Geertz's witness Young and which also addressed Armstrong's
5 deficiencies as a witness, expert or otherwise. [Sep.St.No. 8];

6 6. Armstrong is mentioned in only one paragraph in the
7 Miscavige declaration. That paragraph consists of testimony of
8 Mr. Miscavige which refutes the testimony of Young, and the
9 decision which Young had attached to his declaration. It states
10 that Armstrong had lied about being fearful of the Church, and
11 that Armstrong had, in fact, been captured on videotape plotting
12 to overthrow the Church's leadership. It also provides any
13 testimony which Mr. Miscavige may have offered to refute
14 Armstrong's proposed "expert" testimony. [Id.]

15 On demurrer, this Court found that,

16 [I]t cannot be determined from the face of the
17 complaint or judicially noticed matters that the
18 absolute judicial privilege applies. Although cross-
19 defendant provides a copy of the declaration, the court
20 cannot notice the truth of statements made in that
21 declaration. [citation] Even if the court could
22 judicially notice the truth of the declaration, cross-
23 defendant has failed to show how statements about
24 cross-complainant, a non-party to the action, were made
25 to achieve the objects of the litigation or were
26 relevant or connected.

27 In support of its demurrer, the Church had provided this
28 Court with only a copy of the declaration which is the subject of
29 Armstrong's claim. The more complete record provided here,
30 however, demonstrates each of the four criteria necessary to
31 invoke the privilege, without any reference to the truth or
32 falsity of any of the factual matters asserted in the Fishman
33 documents.

1 First, the declaration was filed in a judicial proceeding.
2 Second, it had a logical relationship to Fishman. Armstrong had
3 been named as an expert witness by one of the defendants, and
4 another expert witness had already filed a declaration concerning
5 Armstrong and Mr. Miscavige. Third, Mr. Miscavige's statements
6 about Armstrong were obviously made to help achieve the objects
7 of the litigation. Armstrong had interjected himself into the
8 Fishman litigation by agreeing to testify as an "expert" witness
9 for defendant Geertz, and by claiming that he would testify in an
10 extremely negative manner about the Church. The paragraph of Mr.
11 Miscavige's declaration in question addressed Armstrong's
12 credibility and honesty, both of which had been placed at issue
13 by defendant Geertz. Finally, Mr. Miscavige, named as a witness
14 by both defendants, was certainly "authorized by law" to
15 participate in the litigation. Moreover, Armstrong himself was
16 voluntarily "involved" in the litigation as a self-proclaimed
17 "expert" witness.

18 Under these circumstances, it is plain that no issue of
19 material fact exists which could render Armstrong's allegation
20 that Mr. Miscavige's declaration amounted to an abuse of process.
21 The declaration is privileged as a matter of law. The Church is,
22 accordingly, entitled to summary adjudication as to this claim
23 for abuse of process.

24 **C. The Church Is Entitled To Judgment On Armstrong's Second**
25 **Claim For Abuse of Process Because Armstrong Cannot Show**
26 **That The Church Used The Processes Of The Court For An**
Ulterior Purpose

27 Armstrong's second claim for abuse of process concerns
28 discovery taken in this action. Armstrong alleges that the

1 Church obtained discovery concerning Armstrong's financial
2 records for an improper purpose, i.e., "to feed its intelligence
3 gathering apparatus, intimidation and retaliation." As is
4 demonstrated below, and by reference to the records of this
5 Court, this cause of action also fails to state a cognizable
6 claim for abuse of process.

7 It is well-established that in order for an action to
8 constitute an abuse of process,

9 Some definite act or threat not authorized by the
10 process, or aimed at an objective not legitimate in the
11 use of the process is required; and there is no
12 liability where the defendant has done nothing more
13 than carry out the process to its authorized
14 conclusion, even though with bad intentions.

15 Thornton v. Rhoden (1966) 245 Cal.App.2d 80, 95, 53 Cal.Rptr.
16 706, 717. In Thornton, the plaintiff alleged that defendant had
17 abused process by taking, transcribing and filing a deposition in
18 which the defendant made false and defamatory claims. The Court
19 of Appeal found that the alleged taking and transcribing of the
20 deposition were privileged actions, and "even if we disregard the
21 privilege, it is obvious that just taking the ordinary steps in
22 connection with the taking, transcribing and filing of the
23 deposition cannot be an abuse of process." 53 Cal.Rptr. at 720.

24 Id.

25 Indeed, an action for abuse of process exists only when the
26 process is used to gain an unjustifiable collateral advantage.
27 Allegations of objections such as vexation or harassment are
28 insufficient to give rise to the tort as a matter of law. Golden
v. Dungan (1971) 20 Cal.App.3d 295, 301-302, 97 Cal.Rptr. 577;
Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal.2d

1 461, 466, 72 Cal.Rptr. 344, 446 P.2d 152.

2 Here, this is an action for fraudulent conveyance. At issue
3 in the case are transactions, freely admitted by Armstrong, in
4 which he "gave away" large amounts of property and cash.

5 [Sep.St.No. 10, 11.] The Church paid Armstrong \$800,000 in 1986
6 in settlement of the earlier litigation, and claims that
7 Armstrong gave away his property so as to be "judgment proof"
8 when he began breaching that settlement agreement. [Sep.St.No.
9 12, 13.] Financial transactions between Armstrong and the other
10 defendants, including Michael Walton, thus form the very heart of
11 the action.

12 The Church propounded two sets of requests for the
13 production of documents to Armstrong. In those combined sets,
14 only seven requests sought personal financial record information.
15 [Sep.St.No. 14.] Armstrong objected to all of the Church's
16 requests for production of documents, including those for
17 financial records, requiring the Church to make a motion to
18 compel production. [Sep.St.No. 15.] The motion was denied in
19 part and granted in part by the referee, Mr. Benz, who found that
20 the relevancy of the requested records outweighed Armstrong's
21 privacy claims. [Sep.St.No. 16.] The documents provided by
22 Armstrong to the Church pursuant to these requests have been used
23 by the Church and its counsel to prepare for trial in this
24 action, and have been used for no other purpose. [Sep.St.No.
25 17.] Armstrong can identify no "collateral advantage" afforded
26 the Church in seeking and obtaining these records, because there
27 has been none. The discovery goes directly to the merits of the
28 Church's fraudulent conveyance action, and amounts to nothing

1 more.

2 Younger v. Solomon (1974) 38 Cal.App.3d 289, 113 Cal.Rptr.
3 113, cited by the Court in overruling the Church's demurrer as to
4 this claim, is easily distinguished. In Younger, the defendant
5 had interposed interrogatories in a tort case which quoted from
6 and attached a state bar complaint against the plaintiff. The
7 Court found that even though the interrogatories in general were
8 validly posed, that by attaching the extra, normally confidential
9 documents the defendant had raised an issue of fact as to whether
10 he intended to obtain the collateral advantage of damaging
11 plaintiff's reputation as a lawyer and removing him as a
12 competitor in the practice of law. 38 Cal.App.3d at 298.

13 Here, Armstrong has failed to allege or show any collateral
14 advantage which the discovery of his financial records could or
15 did afford to the Church. They might serve to prove the Church's
16 affirmative case in this action -- hardly a collateral advantage.
17 If Armstrong felt vexed, harassed or intimidated by the
18 discovery, his subjective feelings about it afford the Church no
19 collateral advantage. He voiced his objections to the referee;
20 the referee overruled them. The Church's taking of discovery
21 under these circumstances simply does not give rise to a claim
22 for abuse of process. Accordingly, the Church is entitled to
23 summary adjudication of this claim as well.

24 V. CONCLUSION

25 Reference to this Court's records and those of the United
26 States District Court for the Central District of California
27 reveals that Armstrong's last remaining allegations fail to state
28 a claim for abuse of process. The declaration of David Miscavige

1 has been demonstrated to be absolutely privileged. Further, the
2 taking of discovery in this action has been shown to be entirely
3 proper. The Church is thus entitled to summary judgment on
4 Armstrong's cross-complaint.

5 DATED: July 22, 1994

Respectfully submitted,

6 BOWLES & MOXON

7
8 By: 

9 Laurie J. Bartilson

10 Andrew H. Wilson
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11 Attorneys for Plaintiff
12 and Cross-Defendant
13 CHURCH OF SCIENTOLOGY INTERNATIONAL
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28 H:\ARMFRAUD\XCLMSJ.MEM

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[] ****** Such envelopes were hand delivered by Messenger Service

Executed on _____, at Los Angeles, California.

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[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Print or Type Name

Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)